

Montana Water Court  
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**FILED**  
07/07/2023  
Sara Calkins  
CLERK  
Montana Water Court  
STATE OF MONTANA  
By: D'Ann CIGLER  
43B-0191-R-2020  
Lambert, Kathryn  
3.00

MONTANA WATER COURT, YELLOWSTONE DIVISION  
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN  
BASIN 43B  
PRELIMINARY DECREE

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CLAIMANTS: David E. Hayes; Leanne M. Hayes

**CASE 43B-0191-R-2020**  
43B 7355-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's finding of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**

The ditch identified on the abstract for this claim in the Preliminary Decree is Upland Ditch. During preparation of the Preliminary Decree, the point of diversion legal description was changed to the legal description for Mill Creek Flat Ditch, not for Upland Ditch. In 2021, the Montana Department of Natural Resources and Conservation ["DNRC"] prepared a new marked aerial photograph for the Mill Creek claimants and the Court to use to determine the

correct ditch name and point of diversion legal description. On April 5, 2023 the Order Re-Opening Case And Setting Filing Deadline was issued to address this error with the claimants. A copy of the new marked aerial photograph was included. Nothing was filed by the claimants. The May 9, 2023 Order Setting Show Cause Filing Deadline states:

The abstract of claim 43B 7355-00 states that the ditch name is Upland Ditch but the point of diversion legal description is for Mill Creek Flat Ditch. The Statement of Claim states that the ditch used is Upland Ditch. Therefore, it is ORDERED that the deadline is **May 30, 2023** for the claimants to file a written statement showing cause why the Court should not change the point of diversion legal description to the NENENW section 3, T6S, R9E, PARK. If not filed by May 30, 2023, the Court will conclude the claimants agree with this change and will proceed with changing the claim as detailed above.

Nothing was filed. These documents are viewable in the Court's FullCourt Enterprise case management system.

#### APPLICABLE LAW

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

#### FINDING OF FACT

The Preliminary Decree states that the ditch name is MILL CREEK FLAT DITCH. The ditch name should be UPLAND DITCH. The point of diversion legal description is already correctly appearing on the abstract as the NENENW section 3, T6S, R9E, PARK.

#### CONCLUSION OF LAW

The Statement of Claim and the new DNRC marked aerial photograph are sufficient to contradict and overcome the prima facie claim as incorrectly modified prior to issuance of the Preliminary Decree.

#### RECOMMENDATIONS

Based upon the above Finding of Fact and Conclusion of Law, this Master recommends

that the Court make the change specified in the Finding of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended change has been made in the state's centralized record system.

**ELECTRONICALLY SIGNED AND DATED BELOW**

**Service via USPS Mail:**

David E. Hayes  
Leanne M. Hayes  
PO Box 606  
Gardiner, MT 59030

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK**  
**BASIN 43B**

**Water Right Number:** 43B 7355-00 STATEMENT OF CLAIM

**Version:** 5 -- POST DECREE

**Status:** ACTIVE

**Owners:** LEANNE M HAYES  
PO BOX 606  
GARDINER, MT 59030 0606

DAVID E HAYES  
PO BOX 606  
GARDINER, MT 59030 0606

**Priority Date:** MAY 1, 1904

**Type of Historical Right:** DECREED

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 22.00 GPM

**Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 4 - MODERATELY LOW

**Maximum Acres:** 0.90

**Source Name:** MILL CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENENW	3	6S	9E	PARK

**Period of Diversion:** APRIL 1 TO OCTOBER 15

**Diversion Means:** HEADGATE

**Ditch Name:** UPLAND DITCH

**Period of Use:** APRIL 1 TO OCTOBER 15

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	0.90	11	SENWSW	14	5S	8E	PARK

**Total:** 0.90

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**Remarks:**

AUTHORIZATION TO CHANGE THE POD AND PLACE OF USE ISSUED 01/30/1990 COMPLETED 10/28/1991. FILE REFLECTS RIGHT AS IT EXISTED PRIOR TO JULY 1973. APPROVED CHANGES WILL BE RECORDED AFTER FINAL DECREE. SEE 43B 7355-00

LEASE AUTHORIZATION TO CHANGE THE POINT, PLACE, AND PURPOSE OF USE ISSUED 01/27/1993 TO THE DEPARTMENT OF FISH, WILDLIFE & PARKS. SEE 43B 5862-00.